United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: February 12, 2001

TO : Elizabeth Kinney, Regional Director

Region 13

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Federal Security, Inc. 512-5009-0100

and its Alter Egos and/or Agents, 512-5009-6733

James R. Skrzypek and 512-5009-6733-3300

Janice M. Skrzypek, Individuals

Case 13-CA-38669-1

This case was resubmitted for advice as to whether Federal Security, Inc. (herein Federal Security or the corporation) and its Alter Egos and/or Agents, James R. Skrzypek and Janice M. Skrzypek (herein the Skrzypeks) violated Section 8(a)(1) by filing a state court malicious prosecution, abuse of process and conspiracy lawsuit against its former employees in response to the filing of a meritorious unfair labor practice charge. This memorandum supercedes the previous September 29, 2000 Advice memorandum issued in this case.

FACTS

1. The prior Board proceeding

Federal Security, Inc. contracted with the Chicago Housing Authority to provide security guard services at various multiresidence public housing sites. In August of 1992, Federal Security's guards engaged in a strike and were subsequently terminated by Federal Security for abandoning their posts. In response to Federal Security's action, on August 20, 1992, terminated guard Joseph Palm filed an unfair labor practice charge with the Board. On January 27, 1993, the Region issued a Section 8(a)(1) complaint against the corporation based upon the termination of some 19 employees.

On August 18, 1995, the Board affirmed the ALJ's decision finding that Federal Security violated Section 8(a)(1) of the Act by terminating these employees for participating in the walkout.² The ALJ found that the work

² Federal Security, Inc., 318 NLRB 413 (1995).

¹ Case 13-CA-31155.

stoppage was a protected exercise of Section 7 rights because the guards engaged in the walkout to protest working conditions, benefits and the recent terminations of fellow employee Larry Smith and supervisor Carlton Short.³

On September 9, 1998, the United States Court of Appeals for the Seventh Circuit denied the Board's petition for enforcement of its Decision and Order.⁴ The Seventh Circuit determined that the walkout was unprotected because the security guards exposed the residents of the public housing sites to a heightened danger when they abandoned their posts.⁵ The Seventh Circuit did not reverse the Board's conclusions that the employees' motives for the strike were protected under the Act.⁶

2. The Respondents file and prosecute their state court lawsuit.

On June 2, 2000, ⁷ James R. Skrzypek and Janice M. Skrzypek, the former sole owners of Federal Security, Inc., filed a lawsuit in Illinois state court against Charging Party Joseph Palm and most of the former employees named in the Board charge in Case 13-CA-31155. The lawsuit claims that the employees engaged in malicious prosecution, abuse of process and conspiracy to commit these torts by maliciously filing the NLRB charge against Federal Security with an improper purpose and without probable cause. As Federal Security had apparently ceased doing business in

⁴ <u>NLRB v. Federal Security, Inc.</u>, 154 F.3d 751, 159 LRRM 2228 (7th Cir. 1998).

³ Federal Security, Inc., 318 NLRB at 419-420.

⁵ NLRB v. Federal Security, Inc., 154 F.3d at 757, 159 LRRM at 2232.

⁶ The Seventh Circuit specifically rejected a Respondent defense that the Board could not assert statutory jurisdiction over its operations because of the involvement of the Chicago Housing Authority. See 154 F.3d at 754-55, 159 LRRM at 2230-31.

⁷ All remaining dates are in 2000 unless otherwise indicated.

⁸ James R. Skrzypek and Janice M. Skrzypek v. Kelvin Brewer, et al., Case No. 00L06317 (Circuit Court of Cook County, Illinois, County Department, Law Division).

December 1994^9 and had been involuntarily dissolved in August $1997,^{10}$ the Skrzypeks filed the lawsuit in their capacity as the sole former shareholders of and "successors-in-interest" to Federal Security. 11

In support of their claims, the Skrzypeks allege that in May of 1999, former security guard Michael Davenport stated to James Skrzypek that the guards had fabricated the reasons for the August 1992 strike in order to make it appear that the walkout was concerted union activity so that the NLRB would become involved. Further, it is alleged that Davenport also admitted "that the only reason the guards left their posts was to show support for and loyalty to [supervisor Carlton] Short after he was suspended." [FOIA Exemptions 6, 7(C), and 7(D)] denying making the statements attributed to him by James Skrzypek.

Count I of the lawsuit alleges malicious prosecution in the filing of NLRB Case 13-CA-31155 "without probable cause," 13 and "for improper purposes and with the intent to harass Federal Security." 14 The suit alleges that "[m]alice is the gist of this action." 15

Count II alleges abuse of process and claims that the NLRB charge in Case 13-CA-31155 was filed for "an improper purpose . . . [and] was intended to harass Federal Security, James Skrzypek and Janice Skrzypek," and to retaliate against Federal Security for suspending supervisor Carlton Short. 16 Count II also repeats that malice is the gist of this allegation. 17

⁹ James R. Skrzypek and Janice M. Skrzypek v. Kelvin Brewer, et al., Plaintiff's Complaint paragraph 6.

¹⁰ Id., Complaint paragraph 7.

¹¹ Complaint paragraphs 8-10.

¹² Complaint paragraph 45.

¹³ Count I, Complaint paragraph 49.

¹⁴ Count I, Complaint paragraph 53.

¹⁵ Count I, Complaint paragraph 57.

¹⁶ Count II, Complaint paragraph 50.

¹⁷ Count II, Complaint paragraph 53.

Count III of the lawsuit alleges a civil conspiracy among the former employees to commit malicious prosecution based upon the defendants giving "false statements" to the Board in prosecution of Case 13-CA-31155 which was advanced "without probable cause." It also alleges that employee Palm on behalf of himself and other guards filed "false charges" with the Board. Count III also repeats that malice is the gist of this allegation.

Count IV of the lawsuit alleges civil conspiracy to commit abuse of process and claims that the former employees agreed among themselves to give false testimony under oath before the Board to get their jobs back. This count also claims that the NLRB charge was filed "for an improper purpose" and was intended to harass the plaintiffs. It repeats that malice is the gist of this action.

Under each Count the lawsuit claims that Federal Security, Inc. suffered damages in the amount of \$140,000.00 in attorneys' fees and court costs in defending the NLRB charge and seeks reimbursement of said amount as compensatory damages. Each Count also seeks punitive damages. All Counts seek joint and several liability from all defendants.

On June 30, 2000, Joseph Palm filed the instant charge attacking the Skrzypeks' state court lawsuit as a Section 8(a)(1) violation. On October 12, the Skrzypeks filed a motion for default judgment against 16 of the 17 named defendants in the state court proceeding. On the same date, the state court granted the motion as to 11 of the defendants, as counsel for five defendants had filed an appearance on October 11. On October 18, defendants' counsel filed an unopposed motion to vacate all the technical defaults and extend the time for all defendants to answer or otherwise plead to and including November 13. On November 29, the state court apparently vacated the default judgments against two defendants. As of December 20,

¹⁸ Count III, Complaint paragraph 48.

¹⁹ Count III, Complaint paragraph 49.

²⁰ Count III, Complaint paragraph 53.

²¹ Count IV, Complaint paragraph 48.

²² Count IV, Complaint paragraph 50.

²³ Count IV, Complaint paragraph 54.

counsel had filed a motion to dismiss the lawsuit on behalf of seven defendants, but has refused to further represent the 10 named defendants who have not secured his services. As of January 10, 2001, the state court record reveals no further developments in the litigation.

ACTION

We conclude that the Region should issue a Section 8(a)(1) complaint, absent settlement, alleging that Federal Security, Inc. and James and Janice Skrzypek, either as alter egos or agents of Federal Security, violated Section 8(a)(1) under <u>Bill Johnson's Restaurants v. NLRB²⁴</u> by filing and prosecuting a baseless and retaliatory lawsuit against their former employees.

- a. The Board's exercise of statutory and discretionary jurisdiction in this dispute and the Skrzypeks' personal liability
- (1) As a threshold matter, we believe that the Board will retain statutory and discretionary jurisdiction over this continuing labor dispute, even though Federal Security, Inc. apparently ceased doing business in 1994 and was involuntarily dissolved in 1997. In this regard, the original 1992 labor dispute was revived by the Skrzypeks' 2000 baseless lawsuit, filed in their capacity as the sole former shareholders of and successors-in-interest to Federal Security, Inc..²⁵ The lawsuit is directly aimed at the filing of the original Board charge in Case 13-CA-31155 which concerned the parties' initial labor dispute.

Concerning the Board's exercise of statutory jurisdiction, the Supreme Court has often interpreted broadly the Board's jurisdictional reach pursuant to the Constitution's Commerce Clause.²⁶ The courts have also

²⁵ The Respondents' suit appears to have been brought pursuant to the Illinois corporate remedy survival statute, 805 Ill. Comp. Stat. 5/12.80 (entitled "[s]urvival of remedy after dissolution").

²⁴ 461 U.S. 731, 113 LRRM 2647 (1983).

See NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224, 226, 52 LRRM 2046 (1963) ("[t]his Court has consistently declared that in passing the NLRA, Congress intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause"); Polish National Alliance v. NLRB, 322 U.S. 643, 647-48, 14 LRRM 700 (1944).

upheld Board statutory jurisdiction where respondents ceased engaging in interstate commerce during litigation.²⁷ Indeed, in the collective bargaining context, the Board has not hesitated to retain statutory jurisdiction over an employer which has terminated its operations, even where the violations arise after the closing.²⁸

Further, the Board may be estopped from abrogating its jurisdiction where, as here, the affected employees relied on the Board's protection when filing the initial 1992 ULP charge against Federal Security, which was then clearly an employer engaged in interstate commerce or an industry affecting interstate commerce.²⁹ Moreover, absent the

²⁷ See NLRB v. Cleveland-Cliffs Iron Co., 133 F.2d 295, 300, 12 LRRM 550 (6th Cir. 1943) (court refused to oust the Board of jurisdiction due to the discontinuance of employer commerce during litigation); NLRB v. Forest Lawn Memorial Park Ass'n, 198 F.2d 71, 71-72, 30 LRRM 2438 (9th Cir. 1952) (same).

See Composite Energy Management Systems, 332 NLRB No. 39 (September 28, 2000) (Board retained statutory jurisdiction where alleged bargaining violation occurred over three years after the employer permanently closed its plant); Kranz Heating and Cooling, 328 NLRB No. 52 (1999) (refusal to provide information seven months after going out of business); Benchmark Industries, 269 NLRB 1096 (1984) (Board had statutory jurisdiction to pass on employer's refusal to bargain over the effects of a closing, where employer had ceased operations due to fact facility destroyed by fire and the corporation was in the process of dissolution); American Gypsum Co., 231 NLRB 1291 (1977) (withdrawal of recognition from incumbent union when employer had shut down all operations; Board asserted jurisdiction).

²⁹ See Children's Baptist Home, 215 NLRB 303, 303-304 (1974), enfd. 576 F.2d 256, 260-61, 98 LRRM 3003 (9th Cir. 1978) (where change in Board's discretionary jurisdictional standards would have otherwise left the employees unprotected, Board retained jurisdiction because it would be "unconscionable for the Board now to turn its back on these employees by declining to afford them the protection of the Act which the Board led them to believe they enjoyed"); Pedersen v. NLRB, 234 F.2d 417, 419-420, 38 LRRM 2227 (2d Cir. 1956). As noted supra, n. 6, the Seventh Circuit in Case 13-CA-31155 specifically sustained the Board's assertion of statutory jurisdiction over Federal Security.

Board's retaining statutory jurisdiction, closed and/or dissolved business entities, simply by virtue of that status, will have free reign to bring retaliatory and baseless lawsuits against their former employees. This result would obviously have a "chilling" effect on the exercise of employee rights under Section 7 and frustrate the public policy of promoting full and complete access to the processes of the Board.³⁰

Regarding the Board's exercise of discretionary jurisdiction, we believe that the estoppel and "chilling effect" arguments apply with equal force. Further, in exercising its discretionary jurisdiction as a matter of public policy, the Board makes special exception where the case involves allegations of Section 8(a)(4) of the Act, in order to vindicate the statutory right of all employees freely to resort to and participate in the Board's processes. While not attacked as a violation of Section 8(a)(4), the lawsuit in question is directly aimed at the filing of a Board charge by an employee.

Based on this analysis, we believe that the Board will exercise both statutory and discretionary jurisdiction over this case based on the conclusion that this labor dispute continues to involve Federal Security, Inc., an employer engaged in interstate commerce or an industry affecting interstate commerce.

(2) We also conclude that the Skrzypeks are alter egos of Federal Security under a "piercing of the corporate veil" theory to hold them jointly and severally liable in their personal capacities.³² In White Oak Coal Co., Inc.,³³ the

³⁰ See, e.g., NLRB v. Scrivener d/b/a AA Electric Co., 405 U.S. 117, 123-124, 79 LRRM 2587 (1972), reh. denied 405 U.S. 1033 (1972); NLRB v. Industrial Union of Marine & Shipbuilding Workers of America, 391 U.S. 418, 424, 68 LRRM 2257 (1968); Nash v. Florida Industrial Commission, 389 U.S. 235, 238, 66 LRRM 2625 (1967).

³¹ See, e.g., A.A. Electric Co., 177 NLRB 504 (1969), enforcement denied sub nom. NLRB v. Scrivener, 435 F.2d 1296, 76 LRRM 2318 (8th Cir. 1971), reversed and remanded 405 U.S. 117, 79 LRRM 2587 (1972), enforced on remand 80 LRRM 3055 (8th Cir. 1972); Pickle Bill's, Inc., 224 NLRB 413 (1976).

 $^{^{32}}$ In any event, the Skrzypeks were clearly acting as agents of Federal Security, Inc. under Sections 2(2) and 2(13) in

Board announced that it would pierce the corporate veil when the shareholder and corporation have failed to maintain separate identities and adherence to the corporate structure, or the failure to do so would sanction a fraud, promote injustice, or lead to an evasion of legal obligations. In support of this theory, we would first rely on the evidence that the identities and legal interests of the Skrzypeks and Federal Security have merged de facto. This merger is advanced in the instant lawsuit. See Plaintiff's Complaint paragraphs 6-10. The Skrzypeks are responsible for the instant unfair labor practice, by bringing the state court action as the sole former shareholders of and successors-in-interest to the dissolved corporate entity. This litigation was plainly brought for the Skrzypeks personal benefit, as there is no evidence that any monetary recovery would flow to anyone but the Skrzypeks, since Federal Security has been legally defunct since 1997. In essence, the Skrzypeks breathed legal life into the deceased corporation so it might act as a conduit to achieve their personal retaliatory ends.

Second, failure to hold the Skrzypeks personally liable will work a grave injustice on the former employees who are defendants in the state court action and lead to the evasion of legal obligations. Federal Security, Inc., as a dissolved corporation, is judgment proof. Hence, absent piercing of the corporate veil, the former employees will be unable to recover the legal costs they have incurred defending against this baseless state court litigation.³⁴

In these circumstances, the personal liability of the Skrzypeks as party Respondents under the rationale of $\underline{\text{White}}$ Oak Coal is amply supported.

filing the suit as the sole former shareholders of and successors-in-interest to the defunct corporation.

^{33 318} NLRB 732, 734-35 (1995), enfd. 81 F.3d 150 (4th Cir. 1996)(table). See also West Dixie Enterprises, 325 NLRB 194, 194-195 (1997), enfd. 190 F.3d 1191, 1194-95, 162 LRRM 2399 (11th Cir. 1999); AAA Fire Sprinkler, Inc., 322 NLRB 69, 73-74 (1996); NLRB v. O'Neill, 965 F.2d 1522, 1530-1531, 140 LRRM 2557 (9th Cir. 1992), cert. denied 509 U.S. 904 (1993).

^{34 [}FOIA Exemption 5

- b. Application of the Supreme Court's Bill Johnson's Restaurants analysis
- (1) Board law under Bill Johnson's

In <u>Bill Johnson's</u>, the Supreme Court held that the Board cannot halt the prosecution of a state court lawsuit alleged to be an unfair labor practice unless two conditions are met: (1) the lawsuit lacks a reasonable basis in fact or law; and (2) the plaintiff filed the suit with a motive to retaliate against conduct protected by the Act.

As to the element of baselessness, the Board is not permitted to usurp the traditional fact-finding function of the state trial court. Thus, if a lawsuit raises genuine issues of material fact, the General Counsel of the Board may not proceed with an unfair labor practice charge, but rather must stay the unfair labor practice proceedings until the judicial action has been concluded. The Supreme Court in Bill Johnson's also suggested that in determining whether a suit has a reasonable basis, the Board may draw guidance from the standards used in ruling on motions for summary judgment and directed verdicts. The burden rests on the court plaintiff, however, "to present the Board with evidence that shows his lawsuit raises genuine issues of material fact," and that there is prima facie evidence of each cause of action alleged. The state of the state of the state of action alleged.

Bill Johnson's, 461 U.S. at 745-46. See also <u>Beverly</u> <u>Health & Rehabilitation Services</u>, 331 NLRB No. 121, slip op. at 3-4 and nn. 6-7 (August 8, 2000).

³⁶ 461 U.S. at 745 n. 11. Under such analyses, the court presumes the facts alleged to be true and draws every reasonable inference from the allegations in the plaintiff's favor. See generally <u>Blum v. Morgan Guar. Trust Co.</u>, 709 F.2d 1463, 1466 (11th Cir. 1983); <u>NL Industries, Inc. v.</u> Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

NLRB, 103 F.3d at 1376 (where plaintiff in state lawsuit provides "no evidentiary basis" for suit and fails to describe what evidence he expects to obtain through discovery and to explain why he has not been able to obtain that evidence, the Board may properly enjoin prosecution of that suit prior to discovery).

Retaliatory motive can be proven from evidence that the lawsuit is baseless, ³⁸ that the plaintiff seeks punitive damages, ³⁹ or from the plaintiff's prior animus towards the defendant's exercise of conduct protected by the Act. ⁴⁰ The retaliatory motive can also be determined from the face of the suit, if the activity being attacked is on its face protected conduct under the Act. ⁴¹

(2) The Respondents' lawsuit lacks a reasonable basis in law or fact.

We conclude that the Respondents' malicious prosecution and abuse of process claims, as well as its corresponding conspiracy claims, lack a reasonable basis in law or fact for several reasons.

First, under Illinois law, statements made in the course of quasi-judicial proceedings enjoy an absolute privilege; thus, those statements cannot form the basis for a private cause of action against the declarant. In our view, this absolute privilege clearly applies in this case. The Board is clearly a quasi-judicial body equivalent to the

^{38 &}lt;u>Bill Johnson's</u>, 461 U.S. at 747; <u>Phoenix Newspapers</u>, 294 NLRB 47, 49 (1989); <u>Diamond Walnut Growers</u>, 312 NLRB 61, 69 (1993), enfd. 53 F.3d 1085, 149 LRRM 2400 (9th Cir. 1995).

³⁹ <u>Phoenix Newspapers</u>, 294 NLRB at 49-50; <u>H.W. Barss</u>, 296 NLRB 1286, 1287 (1989); <u>Diamond Walnut Growers</u>, 312 NLRB at 69, enfd. 53 F.3d at 1089.

⁴⁰ See <u>Machinists Lodge 91 (United Technologies)</u>, 298 NLRB 325, 326 (1990), enfd. 934 F.2d 1288, 138 LRRM 2312 (2d Cir. 1991), cert. denied 502 U.S. 1091 (1992); <u>H.W. Barss</u>, 296 NLRB at 1287.

⁴¹ See Phoenix Newspapers, 294 NLRB at 50; Geske & Sons, 317 NLRB 28, 58 (1995), enfd. 103 F.3d 1366, 154 LRRM 2129 (7th Cir. 1997); Dahl Fish Co., 279 NLRB 1084, 1110-1112 (1986), enfd. mem. 813 F.2d 1254, 125 LRRM 3063 (D.C. Cir. 1987); BE & K Construction, 329 NLRB No. 68, slip op. at 10-11 (September 30, 1999); Summitville Tiles, 300 NLRB 64 (1990) (lawsuit motivated by employees' and union's filing of Board charges and state court lawsuit against employer).

⁴² See Thomas v. Petrulis, 125 Ill. App.3d 415, 465 N.E.2d 1059 (Ill. App. Ct. 1984) (no recovery for libel for statements made in EEOC charge based on absolute privilege applied to statements made in quasi-judicial proceedings).

E.E.O.C.⁴³ Further, the privilege extends to all forms of communications connected with the quasi-judicial proceeding.⁴⁴ Moreover, the privilege should extend to causes of action beyond the libel context.⁴⁵ The Respondents' four counts of their lawsuit are each based upon alleged fabrications made by the guards to the Board during the course of the prior Board proceeding, alleged fabrications in the charge and investigation in Case 13-CA-31155 as well as in their testimony before the Board. Hence, because Illinois law grants an absolute privilege for all statements made by persons in connection to a quasi-judicial proceeding like the Board's unfair labor practice proceeding, the Respondents are precluded from basing their claims on these statements. Thus, all their claims are baseless as a matter of law.

Second, there is a high likelihood that Illinois law does not permit either a malicious prosecution or abuse of process claim to be based on the initiation of proceedings before an administrative agency. In Greer v. De Robertis, 46

 $^{^{43}}$ See <u>Thomas v. Petrulis</u>, 465 N.E.2d at 1062-1063 (setting forth and applying a six part test differentiating a quasijudicial body from that performing merely an administrative function).

⁴⁴ See <u>Walker v. Gibson</u>, 633 F. Supp. 88, 89 (N.D. Ill. 1985) (privilege not limited to formal pleadings and in-court communications, but includes any communication pertinent to the pending litigation); <u>Lykowski v. Bergman</u>, 700 N.E.2d 1064, 1071 (Ill. App. Ct. 1998) (absolute privilege exists for any statements made during any step preliminary and necessary to a judicial or quasi-judicial proceeding).

The policies underlying the invocation of the absolute privilege, i.e., promoting full revelation and complete development of the facts underlying a dispute and preventing a chilling effect on the exercise of statutory rights and the resulting frustration of public policy (see Thomas v.Petrulis, 465 N.E.2d at 1063-1064), are similarly jeopardized whether the plaintiff seeks to ground a libel, malicious prosecution or abuse of process claim upon statements made in quasi-judicial proceedings. See, e.g., Haller v.Borror, 1995 WL 479424 (Ohio Ct. App. 10 (Franklin County) August 8, 1995) (absolute privilege for statements made in connection with criminal proceeding applied to subsequent malicious prosecution proceeding).

^{46 568} F. Supp. 1370, 1376 (N.D. Ill. 1983).

a federal district court, interpreting Illinois law, held that the element of malicious prosecution requiring "the commencement ... of an original criminal or civil judicial proceeding" did not embrace prison disciplinary hearings because "the Illinois courts unanimously agree the elements of a malicious prosecution claim must be strictly construed."47 Similarly, in Kirchner v. Greene, 48 an Illinois appellate court expressly rejected expanding the tort of abuse of process to include proceedings before a quasi-judicial administrative body. The court stated that "such expansion is baseless in the law and would be contrary to the narrow strictures to which courts have confined this tort."49 Thus, as a Board unfair labor practice case commences first as an administrative proceeding, subject to later judicial review, it cannot form the basis for either of the primary torts claimed by the Respondents. Once again, the Respondents' four counts must be viewed as baseless as a matter of law.

Moreover, we also conclude that the Respondents' malicious prosecution claim, and the corresponding conspiracy claim, Counts I and III, lack a reasonable basis in fact or law because the Skrzypeks have failed to establish a genuine issue of material fact as to a necessary element. To establish a claim for malicious prosecution under Illinois law, the plaintiff must show: (1) the

 $[\]frac{47}{10.}$, at 1376, citing <u>Franklin v. Grossinger Motor Sales</u>, Inc., 122 Ill. App.2d. 391, 396-397, 259 N.E.2d 307, 309 (1st Dist. 1970).

^{48 691} N.E.2d 107, 117 (Ill. App. Ct. 1998), appeal denied 699 N.E.2d 1032 (Ill. 1998) (table) (proceedings undertaken by the Illinois Department of Children and Family Services).

Morkers, 103 Wash.2d 800, 699 P.2d 217, 220-221 (Wash. 1985) (NLRB unfair labor practice charges cannot form the basis for abuse of process action); Gordon v. Community First State Bank, 587 N.W.2d 343, 353 (Neb. Sup. Ct. 1998) (rejecting application of abuse of process cause of action to proceeding before state banking agency). The definition of process in the context of an abuse of process claim is strictly construed. In Illinois, process is defined as "any means used by the court to acquire or exercise jurisdiction over a person or over specific property." Arora v. Chui, 279 Ill. App.3d 321, 664 N.E.2d 1101, 1108 (Ill. App. Ct. 1996), appeal denied 671 N.E.2d 726 (Ill. 1996) (table).

defendant brought the underlying suit maliciously; (2) the underlying suit was brought without probable cause; (3) the former action was terminated in plaintiff's favor; and (4) plaintiff suffered a special injury or damage beyond the usual expense, time or annoyance in defending a lawsuit.⁵⁰

In order to show the first element, the plaintiff must present evidence establishing that the defendant was "actuated by improper and indirect motives." Thus, the plaintiff in a malicious prosecution action is required to show that the defendant began a proceeding against the plaintiff "with some ulterior purpose other than seeking the benefit that it would receive from a decision in its favor in such action." 52

In this case the Skrzypeks have presented no credible evidence that Joseph Palm, on behalf of himself and the other guards, filed the Board charge in Case 13-CA-31155 for a purpose other than to attain the traditional Board remedies of reinstatement and backpay. The only evidence offered by the Skrzypeks of the guards' ulterior purpose is an alleged May 1999 statement by former guard Michael Davenport that the guards' sole reason for leaving their posts was to show support for and loyalty to supervisor Carlton Short and that the employees wanted to make it appear to the Board that the walkout was concerted union activity. Davenport's alleged statement, however, even if Skrzypek's version is given credit, fails to establish a factual dispute as to the existence of an "ulterior purpose." The alleged Davenport statement supports only the

⁵⁰ See Cult Awareness Network v. Church of Scientology, et al., 177 Ill.2d 267, 685 N.E.2d 1347, 1350 (Ill. 1997), cert. denied 523 U.S. 1020 (1998). While it does not appear that the Illinois test would require the federal standards of bad faith and malice for malicious prosecution actions set forth in LP Enterprises, 314 NLRB 580 (1994), we note that the state lawsuit complaint does allege malice.

⁵¹ See <u>Hulcher v. Archer Daniels Midland Co.</u>, 88 Ill. App.3d 1, 409 N.E.2d 412, 416 (Ill. App. Ct. 1980).

Franklin v. Grossinger Motor Sales, Inc., 259 N.E.2d at 309. See also <u>Hulcher v. Archer Daniels Midland Co.</u>, 409 N.E.2d at 416.

⁵³ See Complaint paragraph 45. Palm's original NLRB charge alleged the guards were terminated "because they engaged in protected, concerted union activities in support of Local 73."

Respondents' contention of what truly motivated the guards 1992 strike. The alleged statement in no way supports any contention that the true motive of the guards' in filing the Board charge in Case 13-CA-31155 and their testimony before the Board was to obtain from the Respondents anything more than their traditional NLRA remedies of reinstatement and backpay under the Board's administrative complaint. Indeed, an allegation of the quards' "ulterior purpose" appears particularly frivolous where the ALJ in Case 13-CA-31155, with Board approval, concluded that the guards' 1992 walkout, even solely to protest supervisor Carlton Short's discharge, constituted protected, concerted activity under the Act which would warrant reinstatement and backpay.54 Accordingly, the alleged Davenport statement fails to constitute evidence that Palm filed the Board charge "maliciously" within the meaning of Illinois law, i.e., with some ulterior purpose other than seeking the benefit that he would receive from a decision in his favor.

Similarly, we conclude that the Skrzypeks' abuse of process claim, and the corresponding conspiracy claims, Counts II and IV, are also baseless because they failed to present a genuine issue of material fact as to the first element. To prove an abuse of process claim under Illinois law, the plaintiff must prove: (1) the existence of an ulterior purpose or motive; and (2) some act in the use of the legal process not proper in the regular prosecution of such proceedings. 55 As previously discussed, the Skrzypeks have failed to present a genuine issue of material fact as to whether the 1992 Board charge was filed and the guards' Board testimony was given with an "ulterior purpose," i.e., a motive beyond obtaining the relief sought in the ULP complaint proceeding. Furthermore, the Skrzypeks also failed to plead the second element of their abuse of process claim, i.e., an act in the use of the legal process not

See 318 NLRB at 420. As noted supra, p. 2, the Seventh Circuit in the prior Board proceeding did not reverse the Board's findings that the guards' motives for the 1992 strike were protected under the Act. Indeed, the Seventh Circuit has commented that the selection of an immediate supervisor can be a subject of protected employee concerns. See Bob Evans Farms v. NLRB, 163 F.3d 1012, 1020-1021, 160 LRRM 2024 (7th Cir. 1998) ("concerted activity over the firing of a supervisor is protected when the identity and capabilities of the supervisor have a direct impact on the employees' own job interests and work performance").

⁵⁵ See <u>Kirchner v. Greene</u>, 691 N.E.2d at 116; <u>Arora v. Chui</u>, 664 N.E.2d at 1108.

proper in the regular prosecution of such proceedings.⁵⁶ Accordingly, the Respondents' abuse of process and related conspiracy claims are baseless because the Skrzypeks failed to present a genuine issue of material fact as to an essential element and failed to plead all elements of the claim.

Finally, to the extent that the Respondents' lawsuit will result in or has already resulted in default judgments against one or more of the individual defendants, such result does not bar Board prosecution of the instant ULP complaint under Bill Johnson's. The Supreme Court noted that if the employer's lawsuit "ultimately proves meritorious," the employer "should also prevail before the Board, for the filing of a meritorious lawsuit, even for a retaliatory motive, is not an unfair labor practice."57 We note, however, that a default judgment does not qualify as a judgment for the plaintiff on the merits of its state law cause of action. The validity of $\overline{\text{the Re}}$ spondents' claims would not have been fully tested by the state court litigation process. Thus, comity to the state court judicial process is no basis to give preclusive effect to a default judgment consistent with Bill Johnson's. The rationale of Bill Johnson's is to protect a party's First Amendment right to litigate on the merits in a state forum all nonfrivolous claims. 58 Thus, the General Counsel's complaint in this case will seek to bar any enforcement by the Respondents of any default judgments obtained in their state court lawsuit.

(3) The lawsuit's motive to retaliate against the protected filing of a charge with the Board

We further conclude that the evidence herein is sufficient to establish an unlawful retaliatory motive for the Skrzypeks' lawsuit. First, the lawsuit itself reveals its retaliatory motive, as the causes of action on their face directly attack Joseph Palm's filing of an unfair labor

N.E.2d 452, 457-458 (Ill. App. Ct. 1972) (court found plaintiff's abuse of process complaint deficient where it only alleged that prior suit was filed with an ulterior purpose).

⁵⁷ 461 U.S. at 747.

⁵⁸ See 461 U.S. at 745 (First Amendment protects party's right to litigate case involving genuine factual issues and have such factual disputes "resolved by a jury").

practice charge in Case 13-CA-31155.⁵⁹ The filing of Board charges is prima facie protected concerted activity under the Act.⁶⁰ Furthermore, the lawsuit seeks punitive damages, as well as extensive damages for alleged compensatory losses.⁶¹ The baselessness of the suit, as described above, further establishes a proscribed retaliatory motive.⁶²

Further, the Skrzypeks' will be unable to prove that its former employees resorted to the Board's processes in bad faith or with malice. In support of all their claims, the Skrzypeks rely solely on a hearsay statement allegedly made by former guard Davenport in May 1999, regarding the alleged false motive for the guards' 1992 strike. First, we note that Davenport, in a Board affidavit, has expressly denied the Skrzypeks' version. Moreover, contrary to the falsifications alleged in the Skrzypeks' lawsuit, the ALJ in Case 13-CA-31155 generally credited the testimony of the former guards named in the Board charge. Further, based on the entire record, the ALJ specifically rejected the Skrzypeks' conclusion flowing from the alleged fabrications, finding that the guards walked out in 1992 for protected reasons in addition to showing support for terminated supervisor Short. Given the Board's conclusions in the 1995 proceeding, the Board is likely to conclude in this case that the guards, through Joseph Palm, filed the charge

 $^{^{59}}$ See, e.g., <u>Geske & Sons, Inc.</u>, 317 NLRB at 58; <u>Phoenix</u> Newspapers, 294 NLRB at 50.

⁶⁰ The filing and maintenance of a lawsuit because an employee or union in good faith filed charges with the Board clearly is retaliatory against protected concerted activity under the Act. See, e.g., Summitville Tiles, 300 NLRB at 65-66; LP Enterprises, 314 NLRB at 581, 587; Angle v. NLRB, 683 F.2d 1296, 1300-01, 111 LRRM 2191 (10th Cir. 1982); The United Credit Bureau of America, Inc. v. NLRB, 643 F.2d 1017, 1022-25, 106 LRRM 2751 (4th Cir.), cert. denied 454 U.S. 994 (1981).

⁶¹ See, e.g., Phoenix Newspapers, 294 NLRB at 49-50.

 $^{^{62}}$ See, e.g., $\underline{\text{Bill Johnson's}}$, 461 U.S. at 747.

⁶³ See Federal Security, Inc., 318 NLRB at 420, where the ALJ stated that "the termination of Short was one of the several factors that precipitated the walkout. Contrary to [Federal Security's] contention however, the evidence establishes that it was by no means the only factor."

in Case 13-CA-31155 in good faith and gave truthful testimony in that proceeding.

Therefore, we conclude that the Skrzypeks have not provided, and will not provide, a sufficient evidentiary basis for their suit's allegation that the charge and the guards' testimony in Case 13-CA-31155 were false and malicious. Thus, the Respondents will be unable to meet their burden of proof under the Seventh Circuit's decision in Geske & Sons, Inc. v. NLRB, 103 F.3d at 1376, 154 LRRM at 2138, to avoid findings of baselessness and retaliatory motive. The fact that the Seventh Circuit ultimately denied enforcement to the Board's reinstatement order in Case 13-CA-31155 does not constitute any finding by the Court of Appeals that the original Board charge and employee testimony were filed and given in bad faith. 64

Finally, the Board's recent decision in Beverly Health and Rehabilitation Services, Inc. 65 is distinguishable. As described supra, this case does not present a situation, as in Beverly Health, where a respondent's state court lawsuit raised a genuine issue of material fact based upon "proper inferences" to be drawn from undisputed fact. 66

(4) Application of Loehmann's Plaza

Finally, the Region should <u>not</u> allege that, under <u>Loehmann's Plaza</u>, 67 the Employer would further violate Section 8(a)(1) of the Act if it does not seek a stay of the state court proceeding within 7 days of complaint issuance. Thus, <u>Loehmann's</u> involved a reasonably based state court lawsuit; the claim that the suit violated the Act rested solely on the premise that the subject of the suit was

⁶⁴ See NLRB v. Auto Workers, Local 212, 690 F.2d 82, 85, 111 LRRM 2599 (6th Cir. 1982) (employees protected in filing in good faith nonmeritorious unfair labor practice charge with Board); Acme Paper Box Co., 201 NLRB 240, 246 (1973) (same).

 $^{^{65}}$ 331 NLRB No. 121 (August 8, 2000) (Board rejected General Counsel's <u>Bill Johnson's</u> lawsuit allegation and ruled that Section 8(a)(1) charge should be held in abeyance pending resolution of the employer's state court defamation lawsuit).

^{66 331} NLRB No. 121, slip op. at 3.

⁶⁷ Loehmann's Plaza, 305 NLRB 663 (1991).

already presented to the Board by virtue of an unfair labor practice complaint attacking a non-judicial predicate act - i.e., the employer's denial of access to private property to protected employee conduct - and the suit was thus preempted under Sears.68. In that situation, the 8(a)(1) complaint allegation under Loehmann's was the only means by which to directly attack the lawsuit as an unfair labor practice.

In this case, the suit is directly attacked as unlawful on the theory that it is baseless and retaliatory under <u>Bill Johnson's</u>. On issuance of the complaint, the lawsuit becomes subject to the Board's primary authority to adjudicate the protected nature of the conduct that is the subject of the suit and it is temporarily preempted consistent with <u>Sears</u>, <u>Roebuck & Co.</u> 69 But since an additional 8(a)(1) allegation flowing from the maintenance of a preempted suit would provide no additional remedy, it is therefore unnecessary to allege the suit is an unfair labor practice on that basis. For the same reason, we also find it unnecessary to litigate the <u>Bill Johnson's</u> footnote 5 "unlawful objective" theory set forth in the September 29 Advice Memorandum, at pp. 7-9.

⁶⁸ See generally Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 207 and n. 43 (1975) (employer's state court lawsuit to ban union picketing on private property not preempted where dispute had not been submitted to Board; Court indicated that preemption would attach if Board asserted jurisdiction over dispute); Id., at 209 (J. Blackmun, concurring); Ibid, at 214 (J. Powell, concurring).

⁶⁹ See 436 U.S. at 201 (Board's primary jurisdiction is invoked where aggrieved party can take its legal position before Board); <u>Id.</u>, at 202 (once Board's primary jurisdiction is invoked, matter must be submitted in first instance to Board rather than state forum); <u>Ibid</u>, at 203 (to allow state jurisdiction might create "significant risk of misinterpretation of federal law and the consequent prohibition of protected conduct").

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer and the Skrzypeks violated Section $8\,(a)\,(1)$ by filing and prosecuting a baseless and retaliatory lawsuit against their former employees. [FOIA Exemption 5

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B.J.K.